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# THE UNDOCUMENTED CONVENTION REFUGEES IN CANADA CLASS: CREATING A REFUGEE UNDERCLASS

JULIA DRYER

## RÉSUMÉ

La «catégorie canadienne de réfugiés non munis de documents au sens de la Convention» a été présentée le 31 janvier 1997. Ce programme s'applique aux réfugiés au sens de la Convention qui ne peuvent recevoir le statut de résident permanent en raison de leur incapacité à produire «un passeport valide et non périmé ou un document de voyage ou encore un document identifiant la personne de manière satisfaisante» conformément à l'alinéa 46.04(8) de la Loi sur l'immigration. Les personnes qui font partie de cette catégorie peuvent obtenir le droit d'établissement cinq ans après la date à laquelle elles ont reçu le statut de réfugié au sens de la Convention. Le programme se limite aux demandes de réfugiés de pays spécifiques qui sont sujets, selon Immigration Canada, à «une agitation extrême». Jusqu'à ce jour, seuls les réfugiés de Somalie et d'Afghanistan sont admissibles au droit d'établissement dans le cadre de ce programme.

L'auteure étudie les modalités de la catégorie canadienne de réfugiés non munis de document au sens de la Convention soulignant que la période d'attente de cinq ans imposée aux demandeurs nuit à leur capacité de se trouver du travail, de poursuivre des études supérieures, de voyager et de parrainer des parents de l'étranger. Elle examine les justifications du gouvernement pour imposer cette période d'attente, tout particulièrement l'objectif d'appréhender des criminels de guerre. Ce raisonnement est démenti par la prépondérance de femmes et d'enfants dans cette catégorie qui sont historiquement plutôt des victimes que des auteurs de crimes de guerre. Elle examine également le piètre bilan du gouvernement canadien dans l'arrestation de criminels de guerre. De manière plus générale, le fait de soumettre les réfugiés au sens de la Convention à ce délai, sur la seule base de leur identité personnelle, est remis en question à la lumière du fait que les réfugiés de cette catégorie ont déjà subi le processus d'établissement canadien du statut de réfugié, dont un des éléments clés est d'établir l'identité de la personne à la satisfaction des membres de la Commission de l'immigration et du statut de réfugié.

L'auteure suggère d'autres explications pour les restrictions imposées dans ce programme, situant cette catégorie dans le contexte historique des politiques canadiennes en matière d'immigration et des politiques d'après-guerre froide. On comprend mieux ce programme à la lumière des mouvements généraux parmi les pays qui

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acceptent des réfugiés selon un modèle de protection temporaire. Dans ce modèle, les engagements au sens de la Convention à l'intégration permanente des réfugiés se résument à une exigence minimale de *non refoulement* dont l'ultime objectif est l'éventuel retour des réfugiés dans le pays qu'ils ont fui. Bien que la catégorie canadienne de réfugiés non munis de documents au sens de la Convention ne soit pas visée explicitement par cet objectif de rapatriement, le programme d'attente avant la naturalisation des réfugiés démontre la tendance canadienne vers une norme de droits restreints et de non intégration.

## I. INTRODUCTION

On 31 January, 1997, the Federal Government of Canada introduced the "Undocumented Convention Refugees in Canada Class" which provided for the amendment of the Immigration Regulations of 1978 [hereinafter UCRCC].<sup>1</sup> In a news release, Immigration Minister Lucienne Robillard presented the UCRCC as the "the best solution"<sup>2</sup> to the problem faced by Convention refugees denied landing due to their inability to produce "a valid and subsisting passport or travel document, or a satisfactory identity document" pursuant to s. 46.04(8) of the *Canada Immigration Act*.<sup>3</sup> In this paper, I argue that the new regulations, which impose a five-year waiting period for the landing of eligible applicants, fail to offer a real solution to the 14,000 refugees caught in this "legal limbo."<sup>4</sup> Furthermore, these regulations signify the Liberal governments retreat from Canada's obligations under international law, a retreat that belies this country's much-heralded image as a world leader in the humanitarian treatment of refugees.

The UCRCC regulations bear critical examination on a number of levels. Reviewing *Citizenship and Immigration Canada's* guidelines, I will discuss their practical implications for refugees denied landing on the basis of s. 46.04(8) of the Act. I will then consider whether these regulations are likely to aid in fulfilling the governments stated purpose of discerning applicants "background and character," in order to identify criminals, particularly war criminals.<sup>5</sup> As I will show, this rationale is dubious in light of the Ministry's poor record of identifying war criminals and preventing their integration into Canadian society. Ironically, the stated goal of correcting this record is belied by the Ministry's failure to respond to recent efforts by Somali-Canadians—one of the communities most affected by the identity-document requirement—to help identify war criminals living among them.<sup>6</sup> Considering the political climate in which

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1. SOR/78-172.

2. Citizenship and Immigration Canada, News Release 97-05, "Lucienne Robillard Announces the Introduction of the Undocumented Convention Refugee in Canada Class," (22 January 1997).

3. R.S.C. 1985, c. 1-2.

4. Resolution 16: "Identity Documents," Canadian Council for Refugees, 19 June, 1996.

5. Citizenship and Immigration Canada, News Release 97-05, *supra* note 2.

6. Interview with Ahmed Samatar, 12 March, 1997. Mr. Samatar is the founder and former president of Midaynta, the Association of Somali Service Agencies in Toronto, and spokesperson, Somali Com-

these regulations have been introduced, I will suggest an alternative, more questionable motivation on the part of the Liberal government. Delaying the provision of essential services to non-white refugees mollifies public concern over high rates of unemployment, global competitiveness and perceived dwindling social services for citizens. Indeed, the government's designation of an "undocumented refugee class," with its misleading suggestion of illegality, reinforces existing xenophobic attitudes.

Considering the UCRCC within the broader context of international law, I will argue that the delay of refugees naturalization violates Canada's obligations under the *Convention Relating to the Status of Refugees*.<sup>7</sup> Additionally, as I will show, in delaying and in some cases preventing the sponsorship of overseas dependents, the UCRCC violates Article 10 of the *Convention on the Rights of the Child*, which mandates a "positive, humane and expeditious" approach to family reunification.<sup>8</sup>

More generally, I will attempt to situate the UCRCC within the context of current trends in international refugee law. In an increasingly mobile world, countries facing a "dramatic increase in numbers of asylum-seekers<sup>9</sup> are retreating from past commitments, largely by narrowing the legal category of refugee.<sup>10</sup> Canada, boasting a quasi-independent refugee determination system which employs a comparatively broad definition of "refugee," would seem to stand apart from this general retreat. And yet, I will contend that the creation of a legal class of unsettled, unnaturalized refugees implicates Canada within another disturbing trend among host countries: the shift from a model of "durable asylum" to the less onerous and ultimately less humanitarian paradigm of "temporary protection."<sup>11</sup>

Unlike many countries which have adopted such a regime at the 'frontier stage of refugee determination, Canada has kept its individualized refugee determination system intact. However, what may appear as a more humanitarian approach on Canada's part betrays a further cause for concern: whereas many countries adopting the 'temporary protection regime claim that they are offering reduced protection to individuals who would not normally qualify as Convention refugees, in Canada it is

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mittee for Fair Immigration Policy; interview with Mohamed Tabit, 26 March, 1997. Mr. Tabit is Program Coordinator of Midaynta, spokesperson for the Somali Committee for Fair Immigration Policy, and an Executive Board member of the Canadian Council for Refugees.

7. 28 July 1951, U.N.T.S. 2545 [hereinafter the Convention]

8. 20 November 1989, U.N.T.S. 1992/3.

9. Joan Fitzpatrick, "Revitalizing the 1951 Refugee Convention" (1996) 9 Harv. Hum. Rts. J. 229 at 230. Fitzpatrick cites Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis*, (New York: Oxford University Press, 1993) at 98, providing estimates of "combined asylum application rates in Europe, North America, and Australia from 1983 to 1991. Most dramatically, whereas the estimated application rate for 1983 was 100,000, by 1991 it had risen to 715,900.

10. *Ibid.* at 41.

11. While the merits of temporary protection are much debated by leading figures in international refugee law, its proponents contend that this relaxed standard, imposing a more realistic and less onerous burden on host countries, will actually result in the protection of more refugees. This debate will be explored in Part VII.

Convention refugees whose rights are being reduced.<sup>12</sup> In the following chapters, I will look beyond the humanitarian 'frontier of Canada's refugee determination system, to examine the regime of reduced 'temporary protection which is being imposed on bona fide Convention refugees.

## II. THE UCRCC IN A NUTSHELL

Guest #1: "... terrible food here ..."

Guest #2: "Yes ... and such *small* portions!"

*dinner conversation overheard at a Catskills Resort*

This exchange, recounted by Woody Allen, captures, in broad strokes, the ironic doublebind encountered in challenging the UCRCC: On the one hand, it offers Convention refugees a five-year delay in their naturalization process, a delay which, I will show, entails considerable hardship and violates international law. On the other hand, this 'offer is extended to only a segment of those whose applications for landing are indefinitely suspended, that is, only those whose country of origin appears in Schedule XII of the Regulations. Before pursuing these two strands of criticism, it is useful to review the UCRCC's basic guidelines.

As of the date of the writing of this paper, only Afghanistan and Somalia have appeared in Schedule XII of the Regulations.<sup>13</sup> Convention refugees from these countries must meet a number of requirements to apply for landing under UCRCC. Having been determined to be Convention refugees in Canada, they must have applied for permanent residence and have paid "all applicable fees", that is the "right of landing fee" of \$975.00, commonly referred to as the "Head Tax," and the processing fee of \$500.00.<sup>14</sup> Generally, s. 46.07(1)b of the *Act* requires Convention refugees to apply for landing within sixty days following their refugee determination; however, the UCRCCs guidelines allow Schedule XII refugees who have not submitted a landing application as of January 31st, 1997, an additional 180 days to apply for landing. This extension until July 30, 1997 is granted "in appreciation of the fact that many undocumented refugees from the prescribed countries may [have failed to meet this deadline] because they recognized the insurmountable barrier to permanent residence presented by the lack of an identity document."<sup>15</sup>

Regardless of the timing of the individual's landing application, the UCRCC application will not be accepted until five years have elapsed from his or her positive CRDD

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12. Joan Fitzpatrick, "Flight from Asylum: Trends Toward Temporary 'Refuge and Local Responses to Forced Migrations" (Address at the Symposium on Immigration Law and the New Century: The Developing Regime, 1994) [35 Va. J. Int'l L. 13].

13. It should be noted that even Schedule XII countries are subject to a "sunset clause" which allows the government to review this list every two years and to remove or add designated countries.

14. Regulations Amending the Immigration Regulations, 1978, Regulatory Impact Analysis Statement, C.Gaz. 1996.I.3256.

15. *Ibid.*

decision. During that five-year period, the applicant and any included dependents must have been residing in Canada continuously. To qualify under the UCRCC, dependents must have been listed on the member's initial application for landing in addition to being listed in the UCRCC application. With the exception of those dependents who arrived in Canada on or before the Regulations pre-publication date (November 16, 1996), eligible dependents must have been residing in Canada at the time the initial landing application was submitted. Dependents of those determined to be Convention refugees prior to January 31, 1997 must have arrived in Canada on or prior to November 16, 1996. Children of Convention refugees who were eligible for inclusion in the initial landing application but have since turned 19 (no longer being minors) are nonetheless eligible for inclusion in the UCRCC as long as they remain unmarried. Overseas dependents are ineligible for inclusion in the UCRCC application, and accordingly must wait to be sponsored once UCRCC members have been landed.<sup>16</sup>

### III. EFFECTS OF THE UCRCC

As I have noted, one glaring inadequacy of the UCRCC is its failure to address the difficulties of Convention refugees from countries other than Somalia or Afghanistan. Among the approximately 14,000 refugees whose applications for landing are "suspended" due to lack of acceptable documentation, there are significant numbers from other countries, most notably Sri Lanka, Iran, and Zaire.<sup>17</sup> In excluding these countries from Schedule XII, Immigration Canada displays a fundamental disregard for the practical reality of refugees. Using the government's own criteria for inclusion in Schedule XII, I would argue that these countries *have* experienced "extreme turmoil" such that their "citizens or nationals" have been and are prevented from complying with s. 46.04(8).<sup>18</sup> Indeed, an internal government memorandum on identity documents, from J.R. Butt, Director of Protection Policy for the Refugee Affairs Branch, to Don MacKay, Chief of Strategic Planning and Legislation, lists Somalia, Sri Lanka, and Zaire as "problem countries."<sup>19</sup>

But more essentially, this standard is too narrow, as is the limiting of Schedule XII designation to refugees from countries that "lack an effective central government."<sup>20</sup> As the Canadian Council for Refugees has argued, there are many other factors which prevent Convention refugees from obtaining the required documentation. Most obviously, regardless of whether there is an existing central government in the refugees home country, individuals who have already been determined to have a "well-founded fear of persecu-

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16. *Ibid.*

17. Canadian Council for Refugees, 19 June 1996, *supra* note 4.; This assessment is also based on my own involvement at PCLS with Iranian, Sri Lankan, and Zairian refugees unable to produce the required documents.

18. Regulatory Impact Analysis Statement, *Supra* note 13 at 3254.

19. "Identity Documents for Refugees Seeking Landing", Employment and Immigration Canada, Memorandum, 1 April 1993.

20. Regulatory Impact Analysis Statement, *supra* note 14 at 3254.

tion”<sup>21</sup> in their countries of origin are understandably unwilling to approach their former governments or embassies, for fear of endangering themselves or any relatives still residing in their country of origin. In my capacity as a student in Parkdale Community Legal Services Immigration Law division, I have encountered refugee claimants and applicants for landing from Zaire who fear any contact with Zairian authorities. This difficulty is compounded by the fact that, even if individuals were willing to approach authorities within Canada, there is no Zairian embassy in Canada. Furthermore, even though a government continues to exist, it will often “refuse to provide identity documents to certain nationals, including those fleeing as refugees.”<sup>22</sup> This common difficulty is recognized in Articles 27 and 28 of the Refugee Convention, which require Contracting States to issue identity papers to refugees, and “in particular,” to “give sympathetic consideration to the issue of .. travel document[s] to refugees .. who are unable to obtain a travel document from the country of their lawful residence.”<sup>23</sup>

More generally, in extending the UCRCC only to those from countries experiencing extreme political upheaval, Immigration Canada displays a basic insensitivity to the social and cultural realities of non-Western countries. As the Canadian Council for Refugees has noted,

[in] many other parts of the world, [where] little reliance is placed on paper,...identity and relationships are established in other ways, such as the testimony of witnesses. An insistence on identity documents discriminates against people from such parts of the world, and in particular against certain sections of the population least likely to have documents: women, rural people and youth.<sup>24</sup>

In the designation of Schedule XII countries, there is no attention to these cultural realities, nor to the decisive impact of class and gender on the availability of paper documentation. As an individual's access to documentation depends on these factors which cut across individual country conditions, entitlement to exemption from s.46.04(8) should be determined on a context-sensitive basis.

For those who do qualify as UCRCC members, the imposition of a five-year waiting period from the date of the CRDD decision to the granting of permanent residence entails considerable hardship. Permanent resident status confers rights essential to the process of integration. Specifically, one must be landed in order to be eligible for employment by the Federal and Provincial governments; thus Convention refugees are barred from any public sector employment. And while refugees are granted temporary work permits, they are issued social insurance numbers that indicate their ‘temporary’ status to prospective employers, thereby reducing their chances of obtaining gainful employment. Without landed status, Convention refugees are required to pay ‘foreign student tuition rates, which are much higher than tuition for residents,

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21. *Immigration Act*, *supra* note 3 at s.2(1); Canadian Council for Refugees, “Refugees and Identity Documents,” October 1996. (downloaded from CCR website).

22. Canadian Council For Refugees, *Ibid.*

23. Refugee Convention, *supra* note 7.

24. Canadian Council for Refugees, October, 1996, *supra* note 21.

and they are not eligible for post-secondary student loans. In addition, without landing, Convention refugees are barred from travel outside of Canada.<sup>25</sup>

In delaying the integration of Convention refugees into Canadian society, the Canadian government is retreating from its obligations under Article 34 of the *Convention Relating to the Status of Refugees*, to which Canada acceded in 1969. Article 34 provides that

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.<sup>26</sup>

The Canadian government's admission, in the UCRCC Regulatory Impact Analysis Statement, that without any exemption "a refugee lacking a satisfactory identity document...would not...ever become fully integrated into Canadian Society," implicates it in a knowing violation of Article 34.<sup>27</sup> That this limbo is allowed to persist indefinitely for refugees from countries other than Somalia and Afghanistan underscores the governments retreat from its Convention obligations.

#### IV. THE IMPLICATIONS FOR FAMILY REUNIFICATION

Perhaps the most damaging effect of the UCRCC arises from its exclusion of members dependents who are outside Canada. In this respect, the five-year waiting period is decisive in delaying, and in many cases actually *preventing* family reunification. For although *Immigration Canada* maintains that "dependents outside of Canada will be eligible to be sponsored in the normal manner.. once permanent residence ... has been granted"<sup>28</sup> to UCRCC members, a realistic assessment of the timeframe for landing UCRCC members show this to be untrue.

In fact, the refugee determination process takes at least one year; added to the subsequent five-year wait for landing, and an additional twelve- to eighteen-month processing delay, the minimum wait for UCRCC members is seven years. As children cease to be "dependents" eligible for sponsorship when they turn nineteen, any children over 12 years of age at the time of separation from his/her parents or guardians will be ineligible for sponsorship once the seven years have passed.<sup>29</sup> In many cases, UCRCC members have been forced to leave behind dependents due to safety concerns, lack of funds or separation prior to immigration. Indeed, the very "turmoil" which precluded their obtaining the required identity documents may well have increased the likelihood of separation. Thus, UCRCC members, subjected to at least a seven-year

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25. Interview with Ahmed Samatar, 12 March 1997, *supra* note 6.

26. Refugee Convention, *supra* note 7.

27. Regulatory Impact Analysis Statement, *supra* note 14 at 3255.

28. *Ibid.* at 3256.

29. M. Bossin, "The new UCRCC Regulations" (Paper presented to the Interclinic Immigration Working Group, Parkdale Community Legal Services, 28 February 1997).



wait from the date they last saw such dependents, face the prospect of never seeing these children again. In addition to the psychological devastation resulting from permanent separation,<sup>30</sup> this barrier to family reunification can have disastrous consequences for family members, particularly children, who remain behind in dangerous, unstable situations or in refugee camps.

In imposing this barrier to family reunification, the government of Canada is in violation of Article 10 of the *Convention of the Rights of the Child*, which it ratified in 1991. Article 10 provides that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner."<sup>31</sup> Canada's delay, and in many cases, actual prevention of family reunification is clearly contrary to the spirit and letter of this international agreement. In addition, Canada's practice disregards the UNHCR's recommendation that "[s]tates...facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted."<sup>32</sup> In 1995, the United Nations Committee on the Rights of the Child reported that it "specifically regret[ed] the delays in dealing with reunification in cases where one or more members of the family have been considered eligible for refugee status in Canada."<sup>33</sup> Given the potentially grave consequences to children barred from Canada under the UCRCC, the 'doublespeak' employed by the government in support of these regulations is particularly objectionable. As Canada is, with the UCRCC, in effect, abandoning children separated from their families under extremely harsh conditions, the assertion that "dependents outside of Canada will be eligible to be sponsored in the normal manner"<sup>34</sup> can only be understood as disingenuous.

As the Canadian Council for Refugees has argued, delays to UCRCC members naturalization and the resulting "marginalization, social alienation, and the deterioration in mental and physical health" will exact a cost not only on those affected but on

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30. In *Refugee Family Reunification: Report of the Canadian Council for Refugees Task Force on Family Reunification* (Montreal: Canadian Council for Refugees, 1995) [hereinafter *Refugee Family Reunification*], the Canadian Council for Refugees reports the effects of delayed family reunification, citing depression, family breakdown, and integration difficulties; See also Mohamed Tabit, Programme Co-ordinator of Midaynta, *supra* note 6. Mr. Tabit reports in a sworn affidavit that "during 1996 alone ... three Somali Convention refugees who [were] in contact with Midaynta commit[ted] suicide specifically because the Ministry would not land them as they [did] not have 'satisfactory identity documents and so they could not help dependents who they believed were in crisis.'" Affidavit, 13 September 1996, submitted in *Ahmed v. Ministry of Citizenship and Immigration*, F.C.T.D. [1996] F.C.J. No. 1368 [hereinafter *Ahmed*].

31. 20 November 1989, U.N.T.S. 1992/3, *supra* note 8.

32. UNHCR Executive Committee, Recommendation no. 15, 1979, cited in *Refugee Family Reunification*, *supra* note 30.

33. *Report of the Committee on the Rights of the Child, Concluding Observations: Canada*, UN GAOR, 51st Sess., Supp. No. 41 UN Doc. A/51/41 (1995) at 84, para. 562. (adopted 9 June 1995), cited in *Refugee Family Reunification*, *supra* note 30.

34. Regulatory Impact Analysis Statement, *supra* note 14 at 3256.

Canadian society as a whole.<sup>35</sup> Indeed, while I have yet to examine the stated objectives of the UCRCC, I would agree that on a surface 'cost-benefit analysis, the UCRCC regulations are inefficient, preventing immigrants from contributing to Canadian life, and delaying their process of adaptation, thereby generating future costs for Canada. But as I will argue, the government's policy of non-integration may be seen as effecting a long-term political and economic 'benefit if it ultimately discourages refugees from making claims in Canada. For this is a Ministry which, in its public relations literature, proudly reports a refugee acceptance rate well within the low end of its anticipated range, as well as its plans for "minimizing abuse of Canada's social programs..."<sup>36</sup> Within the context of this articulated political and economic agenda, the immediate costs of a non-integration policy are offset by the anticipated overall 'benefit of deterring future refugee claims in Canada.

## V. GOVERNMENT RATIONALES FOR THE UCRCC

### 1. *Keeping Canada Safe*

No one brags about being a war criminal, and its not on your passport.

*Bernard Valcourt, Minister of Citizenship  
and Immigration, October 1992*<sup>37</sup>

The Regulatory Impact Analysis Statement for the UCRCC provides the following rationale:

The five-year period allows the opportunity of detecting, often with the assistance of the communities of which they are members, those with histories of criminality, human rights abuses, or other activities that would exclude them from the benefits to which refugees are entitled under the Geneva Convention.<sup>38</sup>

The aim of detecting and apprehending criminals, especially violators of human rights, is both legitimate and crucial. Given recent public outcries against Canadas lax record in excluding and deporting war criminals, this rationale is timely and politically expedient.<sup>39</sup> It is, however, difficult to discern how, if at all, this goal is likely to be furthered by the five-year waiting period.

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35. Canadian Council for Refugees, "Comments on Proposed Regulations Creating the Undocumented Convention Refugees in Canada Class," December 1996.

36. Citizenship and Immigration Canada, "Departmental Outlook on Program Expenditures and Priorities, 1996-97 to 1998-99", 1996. (downloaded from [cicnet.ingenia.com/english/pub/9606/eout.html](http://cicnet.ingenia.com/english/pub/9606/eout.html) serve)

37. reported in "Crimes against Humanity," the 5th estate, 6 October, 1992.

38. Regulatory Impact Analysis Statement, *supra* note 14 at 3256.

39. A recent segment of the CBC documentary series "the 5th estate" publicized the dramatic revelations of a New York police detective who tracked down Nazi war criminals residing in Toronto simply by looking their names up in the telephone directory; See also Neal Sher, "Is a Nazi criminal in our midst?" *The Globe and Mail*, (15 April 1997) D3. This special report by the former Director of Special Investigations for the U.S. Department of Justice, discussed Canada's ongoing failure to ap-

The rationality of the five-year wait is belied by the demographic composition of those most affected by the identity-document requirement. The Minister of Citizenship and Immigration, Lucienne Robillard, has estimated that eighty per cent of affected refugees are women and children.<sup>40</sup> Given that human rights abuses in Somalia were perpetrated by officials in the former dictator Siad Barres regime, and by armed members of the rebel groups, the Canadian government's targeting of women and children is highly questionable. For it is generally known that these groups did not hold positions in Barres government, nor were they armed participants in the factional warfare that brought the government down. Rather, human rights and news reports documented the brutalizing of these civilian groups by Barres regime and by the warring factions<sup>41</sup>.

In fact, the central irony of the governments strategy is that, not surprisingly, those who had access to guns in Somalia also had the necessary 'connections to attain 'internationally recognized identity documents.<sup>42</sup> Thus, far from fulfilling the governments stated aims, s.46.04(8) of the *Immigration Act* actually facilitates the landing of those most likely to be 'well-documented: those who held senior positions in oppressive regimes and military movements. This pattern is entrenched with the introduction of the UCRCC.

Indeed, in a further irony, Immigration Canada has been appallingly lax in following through on tips from the Somali community about human rights violators living in their midst. It was only after members of the Somali community took their story to the media that *Immigration Canada* began to investigate the cases of widely-known war criminals who had passed through Canada's refugee determination system unapprehended.<sup>43</sup>

In what is the most notorious of such cases, the eldest son of Barre himself — Ali Mohamed Siad — entered Canada on July 1st, 1991, "[giving] his real name and [telling] immigration officers he was the son of the deposed president of Somalia."<sup>44</sup> Although this piece of information didn't "trigger any alarm bells" for the Immigration officials, who determined that he had a credible basis for making a refugee claim," Barre was spotted by another Somali, Aweis Issa, who recognized him as the overseer of Lantebur, "a notorious prison where hundreds were tortured and killed." When Issa attempts to notify Immigration met with little response, he "decided to embarrass the

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prehend known Nazi war criminals.

40. Donovan Vincent, "Refugees get landed status with no ID" *The Toronto Star* (14 November 1996)A 17.

41. Amnesty International, "Somalia, a human rights disaster," 5 August 1992; Amnesty International Report, 1992.

42. Citizenship and Immigration Canada, News Release 97-05, *supra* note 5; Canadian Council for Refugees, October 1996, *supra* note 21 at #21.

43. Interview with Ahmed Samatar, *supra* note 6.

44. "Crimes against Humanity, *supra* note 37.

Immigration Department into action, handing out petitions [and] holding protests..." It was only then that Immigration began to prepare a case against Barre.<sup>45</sup>

Equally disturbing is the case of Yusuf Abdi Ali Tokeh. As of October, 1992, he had been identified by Somalis in Toronto as "Tokeh," one of Barres military commanders, known to have "maimed, tortured and terrorized" people in the village of Gibiley, and to have "had more than 100 people executed."<sup>46</sup> But although his refugee claim was rejected, he had evaded his deportation order to the U.S. *Immigration* had issued a warrant for his arrest in March 1992, but in October of that year reported that they could not find him—this despite the fact that he had been identified by Somalis in Toronto. Indeed, a small group had demonstrated outside his apartment building a year and a half earlier. Responding to questioning on this case, Bernard Valcourt, Minister of Citizenship and Immigration at the time, remarked: "Maybe you're right...that there is someone out there in the department who doesn't care. Maybe. I'll look into this."<sup>47</sup>

The Ministry has been equally unresponsive to attempts by Somali community organizations to work with *Immigration* officials in helping to ascertain the identity of legitimate Convention refugees who apply for landing. Coming from a country which never relied on paper identification in the first place, Somalis are adept at discerning identity through other means such as lineage, clan and subclan membership, and dialect<sup>48</sup>. Midaynta has proposed a number of alternatives to the identity document requirement. Specifically, they have offered to establish a committee of elders who would interview applicants for landing and, based on their knowledge of Somali lineage and culture, verify applicants' identities.<sup>49</sup> Community organizers have also proposed a system whereby permanent residents or citizens would attest to the veracity of an applicants' identity, swearing their testimonies through statutory declarations.<sup>50</sup> In fact, in a system notorious for its inconsistency, a small number of individual immigration officers have, on occasion, accepted such assistance from Midaynta, and have granted permanent residence to refugees based on the organizations verifying of individual's identity.<sup>51</sup> Significantly, this practice has ceased as the Ministry has rejected proposals from the Somali community to adopt such a system officially; following the Ministry's "hard line" on this issue, *Immigration* officials have replaced their inconsistent approach with a uniform rejection of any alternative means of fulfilling s. 46.04(8). Nonetheless, this prior dependence on the expertise of Somali community organizations undermines the Ministry's position that only the specified paper identification documents will safeguard against the landing of criminals.

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45. *Ibid.* Now, after five years in Canada, Siad has lost an appeal to remain here as a political refugee, his initial negative ruling by the IRB having been upheld recently by the Federal Court of Appeal.

46. *Ibid.*

47. *Ibid.*

48. Interview with Mohamed Tabit, *supra* note 6.

49. *Ibid.*

50. *Ibid.*

51. *Ibid.*

The wording of s. 46.04(8) invests immigration officers with considerable discretion; it provides as an alternative to the passport or travel document requirement, that an applicant for landing possess "a satisfactory identity document."<sup>52</sup> And yet, aside from the above-noted exception, Immigration officers have not found any document other than a passport or travel document to be acceptable.<sup>53</sup> In fact, the widespread rigidity of immigration officers in applying s. 46.04(8) prompted the Ministry to release an Operations Memorandum on December 7th, 1995, clarifying the meaning of "satisfactory identity document." Noting that "Federal Court challenges have resulted when the immigration officer reviewing the statutory declaration has summarily dismissed the document...without fully examining [its] contents," it states that "[s]uch a categorical refusal to accept a statutory declaration...is an inappropriate fettering of the officer's discretion."<sup>54</sup> The memorandum then lists the criteria for determining whether a document is "satisfactory: that it be "genuine"; "[belong] to the Convention refugee"; "[provide] evidence of the persons status"; and "*normally* [predate] the claim to refugee status."<sup>55</sup> Contrary to these guidelines, this last criterion has been applied inflexibly, in effect precluding the acceptance of statutory declarations and affidavits which, by necessity, do not predate the refugee claim. But this pattern cannot be explained as simply a reluctance on the part of individual officers to implement guidelines. In fact, although replies to individuals who submit affidavit evidence are usually form letters which provide no explanation as to the reason for rejection, one such letter stated that the *Immigration* officer was "'unable to accept the affidavit itself 'solely on its own merit and that cases like this cannot be resolved until there is 'further direction from the Ministers Office.'"<sup>56</sup>

The most telling detail of this Operations Memorandum is its caveat that "This OM does not apply to 'identity document as required by DROC...'"<sup>57</sup> The Deferred Removal Order Class allowed individuals to apply for landing "if their refugee claim ha[d] been refused by the Immigration and Refugee Board, and they ha[d] been in Canada under an unexecuted removal order for more than three years." Applicants were also required to show that they had secured paid employment for at least six months.<sup>58</sup> Although the DROC program required that applicants provide "satisfactory

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52. *Canada Immigration Act*, *supra* note 3.

53. Mohamed Tabit, Affidavit, 13 September, 1996, in *Ahmed*, *supra* note 30.

54. Citizenship and Immigration Canada, Operations Memorandum, "Landing of Undocumented Convention Refugees and A46.04(8): Evaluating a Statutory Declaration to Determine if it can be Accepted as a Satisfactory Identity Document," 7 December 1995.

55. *Ibid.*

56. Mohamed Tabit, Affidavit, 13 September, 1996, in *Ahmed*, *supra* note 30.

57. Citizenship and Immigration Canada, Operations Memorandum, *supra* note 54.

58. Citizenship and Immigration Canada, News Release 96-31, "Minister Robillard Announces an Initiative to Create a New Resettlement From Abroad Class and Two Others Aimed at Tightening up the Removal Process" (December 19, 1996); *Immigration Regulations*, *supra* note 1 at s. 11.401 (d) providing that "the member must be engaged in employment in accordance with the terms and conditions of a valid and subsisting employment authorization for a total period of not less than six months

identity documents,” the requirement of a “passport or travel document” was waived “in circumstances where, due to the disruption of government in the issuing country, such documents [could not] be obtained.”<sup>59</sup>

In addition to reflecting a basic inconsistency in *Immigration Canada*’s landing policy, this relaxed DROC standard points toward an irony: *Immigration Canada* has applied a more relaxed standard to those who have not been found to be refugees, but have remained in Canada only through the Department’s inefficiency or inability to repatriate the individual. In a policy decision which defies logic, *Immigration* has allowed greater flexibility, not to those who have undergone and satisfied the requirements of the refugee determination process, but to those who have been rejected by the Immigration and Refugee Board. As critics of s.46.04(8) have pointed out, Convention refugees applying for landing will have already undergone a rigorous oral hearing process before the quasi-judicial Immigration and Refugee Board. As this process inevitably involves the establishment of the refugee claimant’s identity—either through documentation, testimony or the testimony of witnesses—Immigration Canada’s insistence on paper documentation at the landing stage is redundant. The failure to hold failed refugee claimants to this standard further underscores the implausibility of the Ministry’s stated “security” rationale.

As might be expected, shortly after announcing the introduction of the UCRCC, the Ministry announced its intention to cancel the DROC program, thereby pre-empting charges of inconsistency by groups critical of the UCRCC. The DROC program was cancelled on May 1, 1997. However, the fact that failed refugee claimants have and continue to be landed under the DROC program further undermines the government’s stated rationale for suspending the landing of Convention refugees for five years. Even if one were to accept the questionable premise that valid passports or travel documents are necessary to safeguard against the landing of criminals, one would expect this standard to be applied more stringently to individuals who had failed to satisfy the requirements of the refugee determination process.

## 2. THE CULTURAL RATIONALE: ECHOES OF CANADA’S RACIST PAST

In its pre-publication of the UCRCC regulations, Immigration Canada offers an additional rationale for the five-year wait:

As well the passage of five years allows for these refugees to establish their ongoing willingness to respect the laws and norms, of Canadian society. Assessment of their conduct during this time in Canada will serve as a substitute for the normal background checks conducted on all immigrants, including refugees, since background

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since making a claim to be a Convention refugee.”

59. Teresa Lamont, Program Specialist with the Selections Branch, Ottawa, *Immigration Canada*, cited in Appellants factum, paragraph 10, *Ahmed*, *supra* note 30.

checks are of limited effectiveness when the name of the individual cannot be confirmed or any of the personal information corroborated by official records.<sup>60</sup>

As the Canadian Council for Refugees has noted, this rationale is discriminatory, penalizing and "criminaliz[ing]" people in response to a situation beyond their control<sup>61</sup>

In terms of its practical viability, this stated purpose is subject to the some of the same challenges as the government's 'criminality rationale: Does paper identification establish an individual's willingness and ability to accept the cultural and legal norms of the host country? Has not the Convention refugee sufficiently proven him/herself in the one- to two-year wait involved in the refugee determination process and subsequent delay in processing landing applications? Why should Convention refugees be subjected to a longer wait than applicants under the DROC program?

Implausible from a practical standpoint, this stated objective works on a symbolic level, subtly reinforcing the racist sentiment which has informed previous exclusionary measures in Canada throughout this century. It is noteworthy that the identity-document requirement has posed problems almost exclusively for refugees from non-western countries such as Somalia, Afghanistan, Iran, Sri Lanka and Zaire. Given this pattern, one might wonder whether this concern for the acceptance of Canada's laws and norms would arise in the formulation of policy for American and European newcomers. A review of immigration policy earlier in the century reveals disturbing precedents for the UCRCC's stated purpose.

One of the most notorious chapters in the history of Canadian immigration details the series of exclusionary measures leveled at Chinese immigrants. The *Chinese Immigration Act* was passed in 1885, significantly, as the construction of the Canadian National Railway, built primarily by underpaid Chinese immigrants, approached completion. The Act provided that all Chinese entering Canada had to pay \$50 on arrival. Only "diplomats, tourists, merchants, men of science, and students" were exempted from this head tax.<sup>62</sup> This policy continued until 1923 when it was decided that the head tax had not sufficiently reduced Chinese immigration. In its place, measures directly excluding Chinese immigrants were introduced, limiting entry to four classes of newcomers: "representatives of the Chinese government and their staffs, Chinese children born in Canada, students coming to a university or college, and such merchants as were permitted under regulations prescribed by the minister responsible for immigration."<sup>63</sup>

The nativist public sentiment informing these popular measures has been documented by historians. For present purposes, the official discourse surrounding the legislation of 1923 is particularly resonant. In the *Revised Statutes of Canada* for 1927 the government announced its power to bar the entry of persons

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60. Regulatory Impact Analysis Statement, *supra* note 14 at 3256.

61. Canadian Council for Refugees, December 1996, *supra* note 35.

62. W. Peter Ward, *White Canada Forever* 2d ed. (Montreal: McGill-Queens University Press, 1990) at 42.

63. *Ibid.* at 133.

belonging to any nationality or race ... because such immigrants are deemed unsuitable, having regard to the climatic, industrial, social, educational labour or other conditions or requirements of Canada, or *because such immigrants are deemed undesirable owing to their peculiar customs, habits, modes of life and methods of holding property, and because of their probable inability to become readily assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their entry.*<sup>64</sup> (emphasis added)

While the government's stated rationale for the UCRCC reflects the contemporary distaste for such plainly spoken xenophobia, it echoes the general concern that immigrants who are culturally 'other will not readily adopt 'Canadian ways.

It is difficult to reconcile this concern for the adaptability of refugees with Canada's international image as a mosaic tolerant of its disparate ethnic communities. However, in recent years, we have seen Canada's adoption of an increasingly restrictive and economically driven immigration policy. Indeed, Canada's image as a haven for refugees was established in the years following World War II, when domestic interests were thought to be served by the integration of refugees.<sup>65</sup> As the majority of refugees were of European stock, there was less concern over the problems of cultural assimilation and newcomers provided a much needed source of unskilled labour. Moreover, in the Cold War era, the reception of refugees fleeing Communist regimes was seen as ideologically and strategically sound for North America.<sup>66</sup> With the end of the Cold War, and the perceived decline of western economies, Canada and the U.S. have been less receptive toward refugees. Additionally, during the 1980s, improved means of transport and the emergence of organized smugglers facilitated the arrival of refugees from the developing world.<sup>67</sup> The resulting increase in the numbers of asylum-seekers, and the change in the racial composition of refugees have triggered a backlash in traditional countries of asylum. In Canada, these factors, combined with a growing concern over unemployment, have resulted in a resurgence of the xenophobic sentiment which informed previous exclusionary measures such as the *Chinese Immigration Act*.

This shift is evidenced most dramatically with the recent reintroduction of a "head tax," which exacts a payment of \$975 per adult and \$100 per child in exchange for

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64. John Norris, *Strangers Entertained: A History of the Ethnic Groups of British Columbia*, (Vancouver: Evergreen Press, 1971) at 48; see also Donald H. Avery, *Reluctant Host: Canadas Response to Immigrant Workers, 1896-1994*, (Toronto: McClelland and Stewart, 1995). At 84, Avery cites PC 1204, enacted in 1919, which "barred Doukhobors, Mennonites, and Hutterites because of 'their peculiar customs, habits, modes of living and methods of holding property.'" Avery's book shows that the designation of cultural and ethnic 'others' has not been limited to visible minorities.

65. Refugee Law Research Unit, *The Temporary Protection of Refugees: A Solution-Oriented and Rights-Regarding Approach* (Centre for Refugee Studies, York University, 1996).[unpublished] at 10.

66. *Ibid.*

67. Joan Fitzpatrick, "Flight from Asylum: Trends Toward Temporary 'Refuge and Local Responses to Forced Migrations,'" *supra* note 12 at 29.



permanent residence. A review of immigration statistics reinforces this pattern. *Citizenship and Immigration Canada* proudly reported its levels of immigration for 1995: 20,000 over its projected range of 56,000–61,000 in the “Skilled Worker” class (81,034 total); 249 above its projected range of 15,000–19,000 in the “Business Immigrant” class (19,249 total); and almost 10,000 below its projected range of 53,000–55,000 for the “Close Family Member” class (totaling 43,428). In addition, *Immigration* reports a figure well within its projected range of 24,000–52,000 for the “Refugee” class (26,993) and well below its projected range of 4,000–6,000 in the PDRCC and DROC classes (totaling 450).<sup>68</sup>

Outlining its “Priorities for 1996–1999”, Citizenship and Immigration pledges to “[enhance] Business Immigration,” and to “[strengthen] Family Sponsorships,” by “tightening eligibility criteria, [and] minimizing abuse of Canadas social programs.”<sup>69</sup> Viewed within this context, and with historical perspective, the subtly racist discourse surrounding the UCRCC is not an anomaly, but rather the latest development in a long tradition of exclusionary measures.

## VI. WHAT IT MEANS TO BE “UNDOCUMENTED” IN NORTH AMERICA

On the level of discourse, the UCRCC generates another effect which is both misleading and damaging. On a continent where there is considerable backlash toward “undocumented,” or “undocumented refugees,” the creation of an “Undocumented Convention Refugees in Canada Class” is likely to have an insidious effect. The term “undocumented,” as it is popularly conceived in the U.S., calls to mind immigrants who have overstayed their visas (and their welcome) or entered the country illegally.<sup>70</sup> Given the degree to which Canadians are bombarded by American popular culture, this association undoubtedly has been implanted within the Canadian subconscious.

While the impulse to criminalize refugees who have resorted, often by necessity, to evading the U.S. Immigration authorities is itself questionable, the Canadian borrowing of this term is especially reprehensible. In designating the UCRCC Class, the Liberal government ascribes a taint of illegality to individuals who have satisfied Canada’s rigorous legal requirements for attaining Convention refugee status and are residing in Canada legally. Inaccurate and indeed, deceptive, this blatant misnomer can only be understood as an attempt to reinforce existing xenophobic attitudes in Canada.

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68. Citizenship and Immigration Canada, “Departmental Outlook on Program Expenditures and Priorities, 1996–97 to 1998–99”, 1996. (downloaded from [cicnet.ingenia.com/english/pub/9606eout.html#serve](http://cicnet.ingenia.com/english/pub/9606eout.html#serve))

69. *Ibid.*

70. See for instance Kevin Johnson, “Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class,” 42 UCLA L. Rev. 1512. At 1512 Johnson notes that “undocumented immigrants” have been “politically vilified” in the U.S.

## VII. THE UCRCC AS A RETREAT: FROM PERMANENT ASYLUM TO TEMPORARY PROTECTION

### 1. *Overview of Temporary Protection*

Canada's creation of a refugee class enjoying limited rights and subjected to an extended delay in naturalization may signal a shift toward the model of "temporary protection." This term, which has gained prominence over the past two decades, is subject to differing interpretations and applications as well as ongoing controversy. It is, therefore, useful to review its history before turning to its particular manifestation in the UCRCC.

"Temporary Protection" as first endorsed by the United Nations High Commission on Refugees in 1979 was ostensibly a response to the inability of the traditional individualized Convention refugee determination process to accommodate the "mass influx" of refugees fleeing situations of "armed conflict" or "generalized violence."<sup>71</sup> The traditional focus on "persecution based on certain identity criteria did not encompass the full range of persons crossing international borders for other compelling reasons."<sup>72</sup> This concern for guaranteeing basic protection in situations of "large-scale influx" informed the UNHCR's focus on the minimal obligation of non-refoulement as provided in s. 33 of the *Refugee Convention*.<sup>73</sup> In 1979, the Executive Committee concluded that "in cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge."<sup>74</sup>

Unfortunately, what may have begun as a genuine effort to expand states protective capacity—either by supplementing individualized Convention refugee determination systems, or by establishing basic minimal standards for states without individualized systems—has, in application, resulted in a diminishing of protection. Rather than augmenting generous but individualized systems, "codified systems of temporary protection [have] often *supplant[ed]* more generous" and durable refugee protection programs (emphasis added).<sup>75</sup> As I have noted above, the factors which motivated traditional asylum countries to accept and integrate refugees have largely disappeared.<sup>76</sup> Accordingly, the temporary protection model has been embraced, not as a system for broadening overall protective capacity, but as means of detaching the basic

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71. Joan Fitzpatrick, "Flight from Asylum: Trends Toward Temporary 'Refuge and Local Responses to Forced Migrations'" *supra* note 12, at 41–43.

72. *Ibid.* at 41; see also Guy S. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press: Oxford, 1996) at 189. Goodwin-Gill cites as the causes of the mass influx of refugees over the past decade the crises in Afghanistan, Angola, Bosnia and Herzegovina, El Salvador, Nicaragua, Ethiopia, Mozambique, Somalia and Sri Lanka.

73. s. 33 provides that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

74. *Report of the UN High Commissioner for Refugees*, UN GAOR, 34th Sess, Supp. No. 12, UN Doc. A/34/12 (1979) at 1, cited in Joan Fitzpatrick, "Flight from Asylum: Trends Toward Temporary 'Refuge and Local Responses to Forced Migrations'" *supra* note 12, at 42.

75. *Ibid.* at 44.

obligation of refugee protection from the politically and economically costly process of permanent integration. Indeed, the UNHCR noted in 1993 that “temporary asylum, while broadening refugee protection, may also weaken it “by easing ‘pressure on governments to apply the Convention along with its wide range of economic and social rights.”<sup>77</sup>

This trend has been criticized by scholars who view temporary protection as a potentially humane but pragmatic model for refugee protection. Their criticism, as well as their blueprint for a more humane “rights regarding” model is elaborated in “The Temporary Protection of Refugees: A Solution-Oriented and Rights-Regarding Approach,” a Discussion Paper prepared by the Refugee Law Research Unit at York Universitys Centre for Refugee Studies.<sup>78</sup> This paper looks critically at the UNHCRs guidelines for temporary protection, noting that through contradictory statements and the omission of Convention standards, the UNHCR accords “tacit approval to the use of temporary protection as an opportunity or excuse to restrict refugee rights.”<sup>79</sup> For although the UNHCR guidelines emphasize the principle of non-refoulement, the upholding of basic human rights, and “repatriation when conditions so allow in the country of origin,” these guidelines fall short of Convention standards with regard to “education, employment and identity documents.”<sup>80</sup>

The authors own model includes more extensive rights protection, with an emphasis on family reunification, employment rights, and the provision of identity documents.<sup>81</sup> At the same time, their understanding of “group-based, time-limited and rights-restricted refugee protection” can also be described as a ‘bare-minimum’ or ‘letter of the law’ approach. First, and most significantly, they challenge the “traditional understanding in the North that the grant of refugee status almost always leads to eventual permanent residence.”<sup>82</sup> They take pains to point out that there is “nothing permanent about the obligation” as required under the Convention, which merely mandates that refugees not be sent back to the countries from which they have fled as long as there

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76. See *supra* Part V.2, THE CULTURAL RATIONALE: ECHOES OF CANADAS RACIST PAST.

77. Joan Fitzpatrick, “Flight from Asylum: Trends Toward Temporary ‘Refuge and Local Responses to Forced Migrations” *supra* note 12, footnote 15, at 16.

78. Refugee Law Research Unit, *The Temporary Protection of Refugees: A Solution-Oriented and Rights-Regarding Approach*, *supra* note 65.

79. *Ibid.* at 11.

80. *Ibid.* at 16.

81. Their concern for the provision of identity documents pursuant to Article 7 of the Convention seems to suggest an additional avenue for challenging the legality of the UCRCC. At the same time, “identity document” as used in this context, is forward-looking—one of the rights to be accorded Convention refugees—and as such is silent on the issue of exempting refugees from identity document requirements. Nonetheless, implicit in Article 37 is the recognition that refugees are likely to be without identity documents. In this sense, the Canadian government, in penalizing refugees without identity documents, acts in a way which is contrary to the spirit of the Convention.

82. Refugee Law Research Unit, *The Temporary Protection of Refugees: A Solution-Oriented and Rights-Regarding Approach*, *supra* note 65 at 9.

remains a threat to their "life or freedom."<sup>83</sup> They do allow that if it becomes clear that return within a reasonable period of time is not possible, a more permanent status should be provided," and they caution against keeping refugees in "interminable limbo."<sup>84</sup> It is interesting, given our present context, that the authors identify five years as the cut-off point beyond which 'temporary status would jeopardize the psychosocial health of refugees, and recommend that permanent status be granted at this point.<sup>85</sup> However, they emphasize that this requirement arises "primarily outside the Convention," and they maintain a focus on the adherence of states to Convention requirements.<sup>86</sup>

In making this distinction, the authors virtually read Article 34 out of the Convention. Article 34 provides that States "shall as far as possible facilitate the naturalization of refugees...and in particular make every effort to expedite naturalization proceedings."<sup>87</sup> They interpret "as far as possible" as signaling a tacit exemption of states from fulfilling this obligation.

Furthermore, there is a fundamental contradiction at the heart of this idealized model, betrayed in the authors' repetition of the ominously oxymoronic phrase "solution-oriented and rights regarding." Indeed, the authors acknowledge "the difficult balance inherent in delivering an effective system of protection which is truly rights regarding, but operates at all times with an eye to safe and successful repatriation."<sup>88</sup> They are careful to show that the conferring of certain rights on refugees actually *supports* their eventual repatriation. For instance, a generous approach to family reunification, which preserves the integrity of not only immediate but also extended families, enables refugees to maintain familial ties. This forestalls the process of integration into the asylum society, and prepares refugees for eventual repatriation.

But such a confluence of effects is not afforded by the authors' insistence on full Convention rights of employment and education. Indeed, they acknowledge the "risk that skills development will lead to better opportunities in an asylum state, and serve to dissuade refugees from returning home."<sup>89</sup> Concluding that "access to the same work and education programmes afforded nationals may not meet the special needs of the refugee population,"<sup>90</sup> they tacitly advocate a separate stream of employment and bicultural education for temporary refugees whose ultimate destination is their 'home country.'

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83. *Ibid.* at 6.

84. *Ibid.* at 16.

85. *Ibid.* at 35.

86. *Ibid.* at 6.

87. *Refugee Convention*, *supra* note 7.

88. Refugee Law Research Unit, *The Temporary Protection of Refugees: A Solution-Oriented and Rights-Regarding Approach* *supra* note 65 at 16.

89. *Ibid.* at 32.

90. *Ibid.*

The sense that this subtle ghettoization is more "solution oriented" than "rights regarding" is reinforced by the authors' not-so-subtle recommendation that homeward bound refugees would benefit from such "confidence building" programs as "training in mine awareness."<sup>91</sup> This, they caution, would be appropriate training for refugees returning to Mozambique, where the prevalence of anti-personnel mines results in at least 40 deaths a month. Similarly, they note that "individuals who may have witnessed human rights violations before fleeing [often fear] violence at the hands of the perpetrators," and that "carefully designed witness protection measures may provide some degree of protection."<sup>92</sup>

These allusions to the grave dangers risked in forced mass repatriation undermine the authors' repeated assertion that this model is truly "rights regarding." While their unblinking endorsement of "mine-awareness training" underscores the basic inhumanity of this model, their more palatable advocacy of 'transferable skills and "bilingual" education points to a basic unavoidable tension which they themselves acknowledge:

[i]t is difficult...to create a policy which allows the refugee to live a fruitful life in the country of asylum without being marginalized from the rest of the community, on the one hand, and which, on the other hand, keeps his or her mind open to the possibility of returning home.<sup>93</sup>

With this tension at the heart of the authors' temporary protection model, it is difficult to accept that their blueprint offers a truly "principled and pragmatic approach."<sup>94</sup>

## 2. *The UCRCC: Creating a Refugee Underclass*

Most obviously, the UCRCCs five-year waiting period recalls the five-year limit to temporary status, as conceptualized by the Refugee Law Research Unit. This five-year ceiling provides a context in which to understand the Liberal government's insistence on a five-year waiting period for UCRCC members, despite strong opposition from witnesses who testified before the Standing Committee.<sup>95</sup> In fact, the UCRCC imposes a "legal limbo" of more than five years on its members, who will have already waited at least one year for their refugee hearings before the subsequent five year wait. Thus, UCRCC members will ultimately have waited at least one year beyond what scholars see as a humane limit to the duration of this limbo.

On a literal level, the UCRCC regulations make no mention of eventual repatriation and thus cannot be seen as an actual embrace of temporary protection. However, in subjecting certain populations to "legal limbo," the UCRCC creates the type of refugee

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91. *Ibid.* at 34.

92. *Ibid.*

93. *Ibid.* at 26, quoting M. Kjaerum, "Temporary Protection in Europe in the 1990s" (1994) 6:3 Intl J.Ref.L 444 at 447.

94. *Ibid.* at 26.

95. The House of Commons, Standing Committee on Citizenship and Immigration, Third Report, 11 December 1996.

underclass envisioned by temporary protection advocates. Moreover, the official discourse surrounding identity document legislation echoes the concern among temporary protection advocates with reducing refugee protection to a bottom-line, minimal standard of non-refoulement. In an internal memorandum to Don MacKay, Chief of Strategic Planning and Legislation, J.R. Butt, Director of Protection Policy for the Refugee Affairs Branch observed, "Those who cannot provide such identity still have Canada's protection, in accordance with our obligations under the Convention and Canadian legislation...Few other refugee-receiving countries grant permanent status to refugees."<sup>96</sup>

While the UCRCC implicates Canada in the general movement toward creating a long-term refugee underclass, there is nonetheless a distinction in Canada's approach. Temporary protection, as generally implemented in Europe and the U.S., is afforded not to Convention refugees, but to individuals who are part of a mass influx. Thus, although refugee advocates and scholars point out that many refugees afforded only temporary protection would in fact qualify as Convention refugees under a traditional determination system, states are able to claim that they are not restricting the rights of bona fide Convention refugees. In Canada, it is bona fide Convention refugees whose rights are being eroded under the UCRCC. Eschewing temporary protection regimes in the face of mass influx, Canada reinforces its image as more humane than other Northern countries. However, a closer look at Canadian immigration policy reveals that Canada is curtailing refugee rights, not at the most visible first stage of refugee determination, but further on in the immigration process. In this way Canada is able to keep its refugee determination process intact while eroding rights at the post-determination stage indirectly, through measures such as the identity document requirement and the UCRCC.

### VIII. POSTSCRIPT: WHO LIVES IN LEGAL LIMBO?

The lives of the perpetually "undocumented" attest most strongly to the inadequacy and injustice of the UCRCC. These individuals, who, in the words of J.R. Butt, "still have Canada's protection"<sup>97</sup> are caught in cycles of poverty entrenched by their 'impermanent immigration status. The failings of the UCRCC are evidenced daily in the stories of people who seek legal assistance at Parkdale Community Legal Services. The experience of one young woman is illustrative.

This woman, now in early twenties, had been granted refugee status almost five years previously, in September of 1992. But as her country of origin, Ethiopia, is not included in Schedule XII, she remains ineligible for UCRCC membership and cannot be landed. Having left an abusive relationship in Montreal, she was currently living in a women's shelter with her two children. Her immediate reason for seeking legal help was that the shelter would not assist her in her attempt to be reinstated for Welfare

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96. Employment and Immigration Canada, "Identity Documents for Refugees Seeking Landing," *supra* note 19.

97. *Ibid.*

in Ontario because they questioned her immigration status. She had been living from work permit to work permit, study permits being of little value given the unaffordable “foreign student” rates at post-secondary institutions. Barred from any educational advancement, or stable employment opportunities, she had been unable to develop the skills and experience necessary for any measure of economic independence.

When I inquired into the status of her application for permanent residence, submitted four and a half years previously, she replied that as a teenager fleeing for her life from Ethiopia, she had had no ‘acceptable identity document, and had been told repeatedly that she must produce such a document in order to be landed. When I inquired into her efforts to comply with this direction, she replied that her only option would be submitting forged documents and she was unwilling to comply by breaking the law.

Clearly, a number of factors are implicated in situations of domestic violence, and it would be simplistic to explain this abusive situation in terms of an individual's immigration status. Nonetheless, I cannot help but wonder what educational and employment opportunities might have meant for her in terms of independence and self-sufficiency. Confronted with this individual, would *Citizenship and Immigration* policy makers be able to invoke their stated rationales for withholding permanent residence? Having fled Ethiopia while still a teenager, was this young woman likely to have been concealing a criminal past? Having arrived in Canada while still a highschool student, did she exhibit a resistance or inability to embrace Canadian cultural values? Indeed, in terms of this ‘cultural rationale, the withholding of landing had irrevocably undermined her acculturation process by preventing her from pursuing educational and employment opportunities during this crucial formative stage in her life.

This woman arrived at the legal clinic in a state of extreme distress and weariness, having been branded ‘a difficult case’ at her place of last resort, the womens shelter. At the legal clinic, all we can offer is help renewing her work permit. While she is ineligible for membership in the Undocumented Convention Refugees in Canada Class, the grim reality is that her immigration status affords her ongoing and renewable membership in Canada’s growing underclass.